

No. 93812-1

IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. 74300-7-I)

CITY OF KIRKLAND,

Respondent,

v.

HOPE STEVENS,

Appellant.

REPLY TO STATE'S ANSWER TO
MOTION FOR DISCRETIONARY REVIEW

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I. **THE PROPER INTERPRETATION OF RALJ 9.1(b)(2)
IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST
THAT SHOULD BE DECIDED BY THE SUPREME
COURT PURSUANT TO RAP 13.4(b)(4)**

A. **The City's Answer Relies on Misplaced Authority
and is Proof Positive that this Court Should
Accept Review to Provide Guidance on the
Proper Interpretation of RALJ 9.1(b)(2).**

The City cites to a number of cases that provide no guidance regarding the proper application of RALJ 9.1(b)(2). For example, the City cites *State v. Hill*, 123 Wn.2d 641 (1994). *See* Answer at 10. But *Hill* is a case that involves a Superior Court conviction, not review of a judgment of a court of limited jurisdiction. Moreover, *Hill* involves review of an Order denying suppression of drugs, and it specifically involves the review of written findings of fact which ***are*** required by CrR 3.6. *See id.* at 644.

The City cites to *State v. Weber*, 159 Wn.App. 779 (2011). That case involves the review of express written findings under RALJ 9.1(b)(1), ***not*** RALJ 9.1(b)(2). In *Weber*, there ***were*** factual determinations which were ***expressly*** made to support the denial of a motion to suppress. *See id.* at 784-85. *Weber* provides no guidance about how to apply RALJ 9.1(b)(2) to decisions where findings of fact are ***not*** required.

The City also cites to cases involving appellate review of superior court dismissal orders. *See* Answer at 11 (*citing State v. Wilson*, 149 Wn.2d

1 (2003) and *State v. Sonneland*, 80 Wn.2d 343 (1972)). But these cases have no relevance to the question of how to apply RALJ 9.1(b)(2).¹

The City's repeated citation to irrelevant authorities confirms that there is no existing guidance on how to apply this important procedural rule (RALJ 9.1(b)(2)) – even though there are scores of RALJ cases throughout Washington every year. As such, this issue is ripe for appellate review.

B. The City's Answer Misrepresents the Lower Court Proceedings

The City misrepresents the lower court proceedings in important respects. Perhaps most significantly, the City fails to acknowledge the extent to which governmental misconduct was discussed during the proceedings leading up to dismissal. For example, the City claims:

[o]n January 6, 2015, Mr. Maybrown conceded that, but for the witnesses' absence at a second deposition on January 2, 2015, "[w]e would be prepared for trial in mid-January, if all of this hadn't been created by the **misconduct of these witnesses...**"

Answer at 5 (*quoting* Appendix M at 8:6-10). The City added emphasis to suggest that the conduct of the witnesses was the only issue discussed.

But further down that same page of transcript from the January 6, 2015 proceedings – and conveniently omitted by the City in its Answer – was a discussion of *the City's mismanagement*:

¹ It is noteworthy that the dismissal order in *Sonneland* was affirmed despite the fact that there were no written findings and conclusions. *Sonneland*, 80 Wn.2d at 345-46; 354.

Your Honor, unless the court has more questions, I just don't see how we could fairly get this case ready for trial, no matter how hard we've tried, because of the misconduct of the witnesses *and the mismanagement of the City*.

Answer, Appendix M at 8:18-23 (emphasis supplied).

The City also misrepresents the superior court's ruling. For example, the City would now hope to claim that "the superior court found the trial court had abused its discretion because it did not follow the two-prong standard of CrRLJ 8.3 that requires a showing of governmental misconduct or arbitrary action and prejudice to the rights of the accused which materially affected her rights to a fair trial." Answer at 7 (*citing* Appendix S at 15:20-22). But the superior court never said there was no "showing" of governmental misconduct. Rather, the superior court judge actually said there was "no *finding* of a governmental misconduct or arbitrary action." Answer, Appendix S at 15:20-22.

This distinction is important, because it is clear – based on the entirety of the proceedings, the discussions at the hearings, and the trial court's lengthy comments at the final hearing – the lower court *did* conclude the defense had made a substantial showing of government misconduct.

C. **When Sitting as an Appellate Court in an RALJ Proceeding, the Superior Court Must Accept Factual Determinations that May Reasonably be Inferred from the Judgment of the Court of Limited Jurisdiction**

RALJ 9.1(b) requires the superior court to accept “those factual determinations supported by substantial evidence in the record ... (2) that may reasonably be *inferred* from the *judgment* of the court of limited jurisdiction.” RALJ 9.1(b)(2)(emphasis supplied). The rule makes clear that there is no requirement for the lower court to make explicit findings.

Nevertheless, the City continues to seek to impose a higher burden on the trial court. RALJ 9.1(b)(2) is important, as it reflects the fact that courts of limited jurisdiction often face large caseloads and intense time pressures. Thus, RALJ 9.1(b)(2) acknowledges the reality that many cases will not involve formal findings, and that a reviewing court must infer all findings that may reasonably be inferred from the judgment itself.

Like the superior court judge, the City faults the trial judge because the record does not include the words “governmental misconduct” or “governmental mismanagement” in tandem:

[i]t is a long-recognized logical fallacy to draw an affirmative conclusion from a negative premise. In other words, a court on review cannot infer a finding where no facts support such a finding. If nothing in the record would support an inference, the reviewing court cannot infer facts that have no substantial evidentiary support.

Answer at 10-11 (internal citations omitted).

Yet it is the City’s argument that is fallacious, because the record included copious evidence to support a finding of government misconduct.

By definition, an inference is an unstated finding or conclusion. “Infer” is defined as: “to derive as a conclusion from facts or premises.” Merriam Webster Dictionary, “Infer,” <https://www.merriam-webster.com/dictionary/inferring>.² The City’s interpretation of the rule would render RALJ 9.1(b)(2) – and the requirement that reviewing courts reasonably “infer” factual determinations from the trial court’s judgment – meaningless. Unfortunately, given the lack of appellate court guidance, the superior court seems to have accepted such a reading of the rule.

D. When Drawing all Reasonable Inferences from the Trial Court’s Judgment, It is Apparent the Trial Court Concluded that the Government Had Committed Misconduct Warranting Dismissal

The superior court’s ruling ignored the plain language of the trial court’s comments over the course of multiple hearings and the undeniable thrust of the trial court’s judgment on January 13, 2015 in dismissing the case. The superior court based its ruling on the erroneous belief that the government’s misconduct was never discussed:

[T]he Court, rather than deciding the motion at that point puts it over to January 6th and then to January 13th. And at those hearings all we do is revisit the issue of prejudice affecting the defendant, and there’s no more discussion of whether there’s any actual, uh, arbitrary action or governmental misconduct Well, I’m certainly happy to infer Mr. Maybrown, if you can point me to something in the record

² Commonly recognized synonyms of “infer” support this definition. See <http://www.thesaurus.com> (including “ascertain,” “assume,” “construe,” “deduce,” “derive,” “figure out,” “glean,” “interpret,” “surmise”).

that, that would allow me to infer that the Court actually found governmental misconduct or arbitrary action on the basis of something, of, you know, but there, it isn't here.

Answer, Appendix S at 5-6.

But contrary to the superior court's assertion, the Kirkland Municipal Court Judge repeatedly mentioned the City's misconduct and mismanagement over the course of the hearings. Indeed, the trial court's comments from the January 13 hearing are replete with references to the government's actions:

In addition, on December 30, 2014, *more than six months after the government filed charges* against the defendant, and less than two weeks before trial readiness, *the City filed an additional witness list endorsing four additional witnesses*. The witness list included two medical health professionals, a doctor and a physician's assistant. Both apparently took part in examining the alleged victim/witness after the assault.

Answer, App. P at 12-13 (VRP 1/13/15) (emphasis supplied).

Immediately thereafter, the trial judge made it abundantly clear, in reviewing the case history, that he was considering a motion to dismiss specifically because of mismanagement on the part of the *"prosecutors"*:

The defense again moved to dismiss charges, *citing mismanagement on the part of the prosecutors* by waiting over six months to endorse expert witnesses only days before trial. Again, the court chose to reserve ruling and urged defense counsel to attempt to interview the newly endorsed witnesses with the time left before trial.

Id. at 13 (emphasis supplied).

The trial judge continued his comments by highlighting the government's misconduct in disclosing witnesses shortly before trial:

[i]t's interesting to note that the government has endorsed two doctor witnesses, albeit late, to testify as to the condition of the alleged victim following the altercation These witnesses were added to the government's witness list less than two weeks before trial readiness and more than six months after charges were filed. Now trial readiness is tomorrow.

Id. at 13-14 (emphasis supplied).

Finally, in his penultimate comments summarizing the legal standard and his findings and conclusions, the trial judge's final words before announcing dismissal of the charges called out the **government** for placing Ms. Stevens in the untenable position of being forced to give up her right to a speedy trial, or proceed to trial unprepared:

A dismissal of a criminal prosecution is an extraordinary remedy, as both counsel bring up many times, available only if the accused rights have been prejudiced to the degree that the accused right to a fair trial has been materially affected. Here the defendant's right to a fair trial has been materially affected, in that the defendant is now at the point where she is compelled to choose between two distinct rights, either proceed as scheduled and hear testimony from many witnesses for the first time during trial, thereby violating her effective assistance of counsel, right to confront witnesses, and right to fair due process, or give up her right to speedy trial and ask for yet another extension in hopes the witnesses may cooperate. ***The government simply cannot force a defendant, a criminal defendant, to choose between these rights.***

Defense motion to dismiss pursuant to Criminal Rule 4.7 and 8.3 is granted. All charges are dismissed.

Id. at 15 (emphasis supplied).

These comments make it abundantly clear that the trial court *was* focused on the government’s misconduct when it dismissed the case. The judge did not abuse his discretion simply because the phrase “government misconduct” is not found in that transcript. The entirety of the proceedings makes clear what the trial judge meant. He repeatedly and intentionally called out the “*government*”³ for its actions that resulted in Ms. Stevens being forced to choose between important constitutional rights.⁴

E. Interpretation of an Important Court Rule Does Constitute an Issue of Substantial Public Interest Warranting Discretionary Review

Citing no authority, the City makes the bald statement that the court should not accept review simply “because there are ‘no published opinions

³ It is noteworthy that the Kirkland Municipal Court judge repeatedly used the word “government” to refer to the prosecuting entity (rather than the “City” or the “prosecutor”), which suggests an intent to incorporate the verbiage of CrRLJ 8.3(b).

⁴ The issue of the government’s misconduct in belatedly disclosing four new witnesses had been a subject of the trial judge’s concern at the hearing on January 6, 2015. *See* Answer, App. M at 11-12 (“THE COURT: So prior to the December 19th deposition, it was your intent to call the doctor to testify in your case in chief? MS. MCELYEA: Yes.”); *id.* at 20 (“THE COURT: Were you aware of the medical professionals that were going to be called as government witnesses? MR. MAYBROWN: I wasn’t.”); *id.* at 30 (“THE COURT: Mr. Maybrown, it would be the court’s intent to address the endorsing of additional witnesses at next Tuesday’s motion hearing... you should make every effort to [interview them] this week as well so that I can hear about any difficulties you might have next Tuesday”). Therefore, when the trial court ultimately dismissed the case and repeatedly mentioned the “government”, he was addressing the government’s conduct, as he had indicated he would.

on RALJ 9.1(b)(2)’ or that in ‘absence of a published decision other superior court judges will make the same mistake.’” Answer at 13. To the contrary, Washington’s courts *have* recognized that the need to elucidate – or clarify – the meaning of a procedural statute or court rule is precisely the type of situation warranting discretionary review.

In *State v. Eriksen*, 170 Wn.2d 209 (2010), this Court explained: “We granted [this] motion for discretionary review to resolve this issue of first impression.” *Id.* at 215. *Accord State v. Britton*, 84 Wn.App. 146, 147 (1996) (“Because the issue is one of public interest and also one of first impression, we grant the State’s motion for discretionary review . . .”); *City of Spokane v. Ward*, 122 Wn.App. 40 (2004) (granting review to clarify the meaning of RALJ 9.3); *Grey v. Leach*, 158 Wn.App. 837, 844 (2010) (trial court certified for discretionary review two issues of first impression). As in these other cases, this Court should accept review to provide clarity to the lower courts regarding the proper application of RALJ 9.1(b)(2).

II. THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1) BECAUSE THE APPLICATION OF A HEIGHTENED “GROSS MISMANAGEMENT” STANDARD IS IN CONFLICT WITH NUMEROUS SUPREME COURT DECISIONS

The City fails to squarely address – and appears to concede – Petitioner’s claim that the superior court erroneously applied a “gross mismanagement” standard in lieu of the long-recognized “simple

mismanagement” standard. *See* Answer at 14-16. Rather, the City relies on the claim that the trial court made no finding of governmental mismanagement. *See id.* at 15 (“[t]o be able to apply either standard, there must first be a finding of governmental mismanagement”). But as discussed above, given the trial court’s repeated references to the “government’s” conduct, it is clear that the judge *did* make such a finding. Moreover, the trial judge specifically attributed the violation of Ms. Stevens’ constitutional rights – i.e., the Hobson’s choice requiring her to choose between her right to a speedy trial and her right to be prepared – to “the government.” *See* Answer, App. P at 15:22. In so doing, the trial judge articulated precisely the injury contemplated by the cases interpreting rule 8.3(b).

This Court should grant review and remind the lower courts that it meant what it said: simple mismanagement is sufficient to support dismissal under Rule 8.3(b).

RESPECTFULLY SUBMITTED this 12th day of December, 2016.

by TM

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Allen, Hansen, Maybrown & Offenbecher, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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